IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

VICENTE HERNANDEZ,	§	
	§	
VS.	§	CIVIL ACTION NO.4:10-CV-433-Y
	§	
RICK THALER,	§	
Director, T.D.C.J.	§	
Correctional Institutions Div.	§	

ORDER DENYING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, ORDER ADOPTING MAGISTRATE JUDGE'S FINDINGS AND CONCLUSIONS AND, ORDER DENYING CERTIFICATE OF APPEALABILITY

In this action brought by petitioner Vicente Hernandez under 28 U.S.C. § 2254, the Court has made an independent review of the following matters in the above-styled and numbered cause:

- 1. The pleadings and record;
- 2. The proposed findings, conclusions, and recommendation of the United States magistrate judge filed on November 23, 2010; and
- 3. The petitioner's written objections to the proposed findings, conclusions, and recommendation of the United States magistrate judge filed on December 15, 2010.

The Court, after **de novo** review, concludes that the Petitioner's objections must be overruled, and that the petition for writ of habeas corpus must be denied, for the reasons stated in the magistrate judge's findings and conclusions.

The Court notes although Hernandez filed a motion for leave to proceed in forma pauperis, he subsequently paid the \$5.00 filing fee. Thus, the motion to proceed in forma pauperis must be denied as moot.

Therefore, the findings, conclusions and recommendation of the magistrate judge are ADOPTED.

Petitioner Vicente Hernandez's petition for writ of habeas corpus under 28 U.S.C. § 2254 is DENIED.

Hernandez's June 18, 2010, motion for leave to proceed in foram pauperis (doc. 2) is DENIED as moot.

Certificate of Appealability

Federal Rule of Appellate Procedure 22 provides that an appeal may not proceed unless a certificate of appealability (COA) is issued under 28 U.S.C. § 2253.¹ Rule 11 of the Rules Governing Section 2254 Proceedings now requires that the Court "must issue or deny a certificate of appealability when it enters a final order adverse to the applicant."² The COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right."³ A petitioner satisfies this standard by showing "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further."⁴

Upon review and consideration of the record in the abovereferenced case as to whether petitioner Hernandez has made a showing that reasonable jurists would question this Court's rulings, the Court determines he has not and that a certificate of appealability should not issue for the reasons stated in the December 15, 2010, Findings, Conclusions, and Recommendation of the

¹See Fed. R. App. P. 22(b).

 $^{^2}$ Rules Governing Section 2254 Proceedings in the United States District Courts, Rule 11(a) (December 1, 2009).

³28 U.S.C.A. § 2253(c)(2)(West 2006).

⁴Miller-El v. Cockrell, 537 U.S. 322, 326 (2003), citing Slack v. McDaniel, 529 U.S. 473, 484 (2000).

United States Magistrate Judge. 5

Therefore, a certificate of appealability should not issue. SIGNED December 28, 2010.

TERRY R. MEANS

UNITED STATES DISTRICT JUDGE

 $^{^5} See$ Fed. R. App. P. 22(b); see also 28 U.S.C.A. § 2253(c)(2)(West 2006).